Supreme Court, U.S.
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No. 07- 06-956

IN THE

Supreme Court of the United States

PROMEDICA HEALTH SYSTEMS, INC., THE TOLEDO HOSPITAL, AND TOLEDO CHILDREN'S HOSPITAL,

Petitioners,

v.

NATIONAL LABOR RELATION BOARD,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether a hospital employer, who maintains a lawful policy against solicitation and distribution of literature by employees in patient care areas, but who has permitted or overlooked some instances of charitable or personal solicitation, violates the National Labor Relations Act if it enforces the policy in a situation involving union-related solicitation or distribution.

PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

The parties in the Sixth Circuit Court of Appeals were the National Labor Relations Board, ProMedica Health Systems, Inc., the Toledo Hospital, and Toledo Children's Hospital. ProMedica Health Systems, Inc. has no parent corporation, and there is no corporation that owns ten percent or more of its stock. The Toledo Hospital and Toledo Children's Hospital are wholly owned subsidiaries of ProMedica Health Systems, Inc.

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PETITION FOR WRIT OF CERTIORARI

OPINIONS BELOW

The judgment of the court of appeals below is unreported. (Pet. App. 3a.) The order of the National Labor Relations Board and the recommendation of the administrative law judge are reported as *ProMedica Health Sys., Inc.*, 343 NLRB No. 131. (Pet. App. 21a.)

JURISDICTION

The court of appeals entered its judgment in this matter on October 5, 2006. Jurisdiction exists in this Court under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS

In its pertinent part, the National Labor Relations Act ("NLRA" or "Act") provides that:

> It shall be an unfair labor practice for an employer –
>
> (1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 157 of this title;
>
> . . . .
>
> (3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization . . . .

29 U.S.C. § 158(a)(1) & (a)(3).

STATEMENT

At issue in this case is whether, under the NLRA, a hospital employer who has previously permitted or overlooked isolated instances in which employees sold Girl Scout cookies, church raffle tickets, or the like is thereafter barred from undertaking any efforts to control union-related

solicitation and distribution in these same areas. The National Labor Relations Board ("Board") and the United States Court of Appeals for the Sixth Circuit answered this question in the affirmative. This holding, however, conflicts with decisional authority from at least two federal circuits; is inconsistent with the will of Congress as expressed in the Act; and stands as an impediment to health care institutions' ability to provide patients with the peaceful atmosphere and tranquil environment necessary for the effective delivery of patient care.

By way of background, it is well-settled that the Act *permits* hospitals to prohibit solicitation and the distribution of literature – even if union-related – in the areas that it delivers patient care. *See NLRB v. Baptist Hosp., Inc.*, 442 U.S. 773, 790 (1979) (holding that the employer lawfully prohibited "solicitation in the corridors and sitting rooms on floors of the Hospital housing either patients' rooms or operating and therapy rooms"). This rule is grounded directly in patient care concerns. *See Beth Israel Hosp. v. NLRB*, 437 U.S. 483, 505 (1978). ("[I]n the context of health-care facilities, the importance of the employer's interest in protecting patients from disturbance cannot be gainsaid.").

Indeed, when Congress first extended coverage of the NLRA to health care institutions in 1974, there "was a recognized concern for the need to avoid disruption of patient care whenever possible." *Id.* at 498 (quoting S.Rep. No. 93-766, p. 6 (1974)). This concern is well-placed:

> Hospitals, after all, are not factories or mines or assembly plants. They are hospitals, where human ailments are treated, where patients and relatives alike often are under emotional strain and worry, where pleasing and comforting patients are principal facets of the day's activity, and where the patient and his family – irrespective of

> whether that patient and that family are labor or management oriented – need a restful, uncluttered, relaxing and helpful atmosphere, rather than one remindful of the tensions of the marketplace in addition to the tensions of the sick bed.

Baptist Hosp., 442 U.S. at 783 n.12 (internal citations and quotations omitted).

These principles and concerns notwithstanding, the Board and lower courts have held that a hospital employer violates the NLRA if, in enforcing a lawful solicitation/distribution policy, it "discriminat[es] against union solicitation." *NLRB v. St. Francis Healthcare Ctr.*, 212 F.3d 495, 961 (6th Cir. 2000). Thus, for example, a hospital commits an unfair labor practice under the NLRA if it simultaneously permits employees to distribute anti-Union literature in patient care areas while forbidding them to distribute pro-union literature. *Id.*

Here, however, the Sixth Circuit enforced a Board order that extends the concept of "discrimination" so as to swallow the general rule permitting hospitals to shield patients from "the tensions of the marketplace." *Baptist Hosp.*, 442 U.S. at 783 n.12 (internal citations and quotation omitted). Specifically, the Sixth Circuit held that an employer who has "knowingly permitted" employee solicitations and distributions wholly *unrelated* to union issues violates the Act if it thereafter enforces its solicitation and distribution policy as to union matters. (Pet. App. 11a.) Under the law of this case, then, an employer who has failed to prevent non-controversial activities such as the sale of Girl Scout cookies or church raffle tickets in patient care areas is thereafter precluded from banning union-related solicitations, or the distribution of union-related material, in any location, including patient care areas.

The Sixth Circuit's opinion is, in equal parts, disturbing and groundbreaking. At least two other courts of appeals

have addressed this question. Giving due deference to patient care interests, both have expressly rejected the standard adopted by the Sixth Circuit and the Board in this matter. *See Manchester Health Ctr., Inc. v. NLRB*, 861 F.2d 50, 54 (2d Cir. 1988); *S. Md. Hosp. Ctr. v. NLRB*, 801 F.2d 666, 674 (4th Cir. 1986). In short, this matter presents an important and recurring question that warrants this Court's review.

I. FACTS

ProMedica operates several hospitals and related facilities throughout Northwest Ohio and Southeast Michigan. Its Central Region encompasses several facilities including The Toledo Hospital, Toledo Children's Hospital, and Flower Hospital. Approximately 7,300 employees work in ProMedica's Central Region facilities.

Within the Central Region, ProMedica applies its Policy #606, which prohibits solicitation and the distribution of literature "in immediate patient care areas." On numerous occasions in prior years, ProMedica managers and supervisors enforced Policy #606 against non-union-related solicitations and distributions. For instance, managers and supervisors have regularly instructed employees that any sales, fundraising activities, and charitable solicitations must be conducted outside of work times and outside of patient care areas. Various ProMedica managers and supervisors have coached and/or disciplined employees for violating the policy by selling theater tickets, wrapping paper, wood work, Girl Scout cookies, car detailing services, wooden shoes, magnets, potholders, name tags, and Avon products in patient care areas and/or on work time. And on a number of occasions, managers have removed from nurses' stations catalogues for products such as Avon cosmetics, Longaberger baskets, and Tupperware containers.

In May and June 2000, ProMedica coached three employees – Dee Lynn Keckler, Cynthia Miller, and Robert

Hazenfratz – for violating Policy #606 by engaging in union-related solicitation or distribution activities in patient care areas.

II. PROCEEDINGS BELOW

On August 10, 2000, the International Union, United Automobile, Aerospace, and Agricultural Implement Workers of America, UAW ("UAW") filed unfair labor practice charges alleging, among other things, that ProMedica's coachings of Keckler, Miller and Hazenfratz violated Sections 8(a)(1) and (a)(3) of the Act. Beginning on October 16, 2001, an administrative law judge ("ALJ") conducted a hearing on the UAW's allegations.

On May 6, 2003, the ALJ issued an opinion, concluding that ProMedica had enforced Policy #606 in a discriminatory fashion. Notwithstanding ProMedica's efforts to enforce the policy as to non-union-related matters, the ALJ determined that ProMedica had not successfully halted all such activities. The ALJ relied upon generalized testimony "that nonunion solicitations generally occurred in the hospital and in the nurses' station; that items such as candy bars were sold; and various catalogs for Tupperware, Mary Kay, and Avon cosmetics, and party books are available in the nurses' station." (Pet. App. 69a.) The ALJ cited no evidence that ProMedica had ever permitted anti-union solicitations or distributions in patient care areas, or that it had ever permitted employees supporting unions other than the UAW to engage in solicitation or distribution activities in such areas.

ProMedica filed timely objections to the ALJ's opinion. On December 16, 2004, and without specifically addressing the appropriate standards for determining whether an employer's enforcement of its solicitation and distribution policy was discriminatory, the Board issued an Order that adopted the ALJ's rulings, findings, conclusions in all respects relevant to this petition. (Pet. App. 21a-22a.)

On May 24, 2005, the Board filed a petition in the Sixth Circuit to enforce its Order. On June 13, 2005, ProMedica filed a cross-petition for review. On October 5, 2006, the Sixth Circuit issued an opinion enforcing the Board's Order with regard to the Hazenfratz, Keckler, and Miller allegations. In this respect, the Sixth Circuit rejected ProMedica's argument that "even if it knowingly permitted 'isolated' non-union related solicitations and distributions, it did not violate the Act by enforcing [Policy #606] against [Hazenfratz, Keckler, and Miller] because they solicited for the Union in patient care areas." (Pet. App. 11a.) The Sixth Circuit acknowledged, however, that its standard for what constituted discriminatory enforcement of an otherwise valid solicitation and distribution policy "conflicts with the Fourth Circuit's rule" in this regard. (*Id.*)

REASONS FOR GRANTING THE WRIT

Under the concept of "discrimination" applied in this matter, a hospital may not undertake efforts to control union-related solicitation or distributions in patient care areas if it has ever condoned or overlooked an employee's sale of Girl Scout cookies or charity raffle tickets at a nurses' station. This is not the law of the Fourth Circuit, and it is not the law of the Second Circuit. This important matter – integral to the right of this nation's health care institutions to control the environment in which patient care is delivered – deserves this Court's time and attention.

I. THIS COURT SHOULD GRANT THE WRIT TO RESOLVE A CONFLICT AMONG THE CIRCUITS.

As previously noted, an employer violates Sections 8(a)(1) and (a)(3) of the Act if it discriminatorily enforces a lawful policy prohibiting solicitation and distribution activity in patient care areas. Lower courts, however, are not of one mind when it comes to what constitutes discriminatory enforcement.

At least two circuits have held that a finding of discriminatory enforcement requires more than a showing that a hospital had previously permitted instances of charitable or personal solicitations, conversations, or distributions. For instance, in *S. Md. Hosp. Ctr. v. NLRB*, 801 F.2d 666 (4th Cir. 1986), the Fourth Circuit denied enforcement to a Board order finding that a hospital employer had violated Sections 8(a)(1) and (a)(3) of the Act by disciplining an employee due to her union-related solicitation at a nurse's station. In so holding, the Fourth Circuit specifically rejected the concept of discrimination espoused by the Sixth Circuit and the Board in this case:

> In dismissing the hospital's explanation for the discipline, the Board relied heavily on evidence that some raffle tickets, Girl Scout cookies and cosmetics were sold by employees without reproach under the hospital's rule. The Board submits that this proves discriminatory application of the rule. However, to follow the Board's reasoning to its logical conclusion, the fact that the hospital had allowed some innocuous activity to go unpunished in the past would mean that *any* subsequent attempt by the hospital to control union solicitation in its patient care areas would have amounted to an unfair labor practice. The care of patients is too important to allow such a result.

Id. at 674.

Similarly, in *Manchester Health Ctr., Inc. v. NLRB*, 861 F.2d 50, 54 (2d Cir. 1988), the Second Circuit declined to enforce a Board order holding that a hospital employer who generally prohibited "the discussion of controversial or disruptive matters in the presence of patients," violated Section 8(a)(1) of the Act by promulgating a rule "that expressly prohibited 'solicitation or talk of union activities in patient area[s]. . . .'" The ALJ in the case had held that the

latter rule was "discriminatorily invalid because it failed to prohibit all non-work-related casual or social conversation during work time." *Id.* The Second Circuit disagreed, concluding that "the rule was not discriminatory." *Id.* To the contrary, the court stated that "[i]t simply flies in the face of common sense to argue, as did the ALJ, that a rule seeking to bring about a healing by limiting potentially explosive exchanges between employees must as a matter of law also prohibit all non-work-related casual or social conversation." *Id.*[1]

In this matter, the Sixth Circuit held that the Board's finding of discrimination was enforceable based upon "evidence that ProMedica's enforcement was lax with respect to *non-union-related* solicitation and distribution" activities such as the sale of "Tupperware, Avon cosmetics, and Girl Scout Cookies, for example." (Pet. App. 8a (emphasis added).) The Sixth Circuit expressly acknowledged that its standards conflicted with cases such as *S. Md. Hosp. Ctr.* and *Manchester Health Ctr.* (Pet. App. 11a ("This circuit's

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[1] Outside of the patient-care context, the Board's concept of "discrimination" has also met with skepticism from some courts. *See, e.g., 6 West Ltd. Corp. v. NLRB*, 237 F.3d 767, 780 (7th Cir. 2001) ("[S]olicitations for girl scout cookies, Christmas ornaments, [and] hand-painted bottles. . . certainly cannot, under any circumstances, be compared to union solicitation. . . ."). Indeed, the Sixth Circuit has rejected the Board's definition of discrimination in cases involving non-employee union organizers. *See, e.g., Sandusky Mall Co. v. NLRB*, 242 F.3d 682, 686 (6th Cir. 2001) ("To discriminate in the enforcement of a no-solicitation policy cannot mean that an employer commits an unfair labor practice if it allows the Girl Scouts to sell cookies, but is shielded from the effect of the Act if it prohibits them from doing so.") (internal citations and quotations omitted);

precedent conflicts with the Fourth Circuit's rule."). Standing alone, this difference of opinion supports the writ.

II. THIS CASE INVOLVES AN IMPORTANT QUESTION THAT DIRECTLY IMPLICATES THE PROVISION OF PATIENT CARE IN THIS COUNTRY.

What constitutes "discriminatory" enforcement of a policy prohibiting solicitation and the distribution of literature in patient care areas is an important question that impacts countless numbers of hospitals, hospital employees, and patients. ProMedica is not alone in its promulgation of a patient-care-area solicitation and distribution policy. Indeed, hospital employers from all regions of the country have issued such policies. *See, e.g.*, Larry W. Bridgesmith & John E.B. Gerth, *The Summer of Union Discontent Portends A Season of Employer Discomfort*, 39 J. Health L. 117, 138 (Winter 2006) ("Knowing when and where nonwork-related verbal solicitation and literature distribution restrictions can be enforced is critical to productivity, safety, and patient care.").

In this context, it is not surprising that there has been repeated NLRA litigation regarding the enforcement of solicitation and distribution policies, and this litigation is likely to increase in the future. Unions frequently challenge such policies as part of organizing campaigns in which they seek consent to represent employees for purposes of collective bargaining. *See generally id.* at 133, 137-38. Commentators have predicted that, with the recent division between the AFL-CIO and the Change to Win Coalition (which advocates more intense organizing efforts), the number of such campaigns is likely to rise. *See, e.g., id.* at 118, 120-23. Moreover, in the current economy, unions increasingly are aiming their organizing efforts at the health care industry. *See id.* at 123 ("There can be little doubt that the healthcare industry is a prime target for union organizing

efforts. Some unions, such as the [Service Employees International Union], have clearly stated their intention to focus on organizing workers in the industry.").

Nevertheless, the varying standards applicable to the enforcement of solicitation and distribution policies leaves employers and employees – not to mention hospital patients – on unstable ground. Hospitals in Ohio now operate under different standards in this area than those in Virginia and New York. And, although solicitation and distribution polices are widespread, neither employers nor unions can be sure when and whether they may be enforced in union-related contexts. This uncertainty over an important matter of federal law deserves review.

III. THE SIXTH CIRCUIT'S DECISION IS WRONG ON THE MERITS AND WILL HAVE DIRE CONSEQUENCES FOR EMPLOYERS, EMPLOYEES, AND PATIENTS.

As to the merits, there is little to recommend the Sixth Circuit's decision enforcing the Board's Order as to the Hazenfratz, Keckler, and Miller allegations. To begin with, the court accepted a highly strained construction of the term "discrimination." Inherent within the common legal understanding of this term is the notion that arbitrary distinctions have been drawn between persons or actions that are *similarly situated.* But there are key differences between an employee engaging in union solicitation, on the one hand, and an employee selling charity raffle tickets, on the other. This Court and the Board have both recognized that the former, infused with the strife and tensions of the workplace, is presumptively disruptive of patient care. *See, e.g., NLRB v. Baptist Hosp., Inc.*, 442 U.S. 773, 778 (1979) (noting that, due to "the need to avoid disruption of patient care," bans on solicitation in patient care areas are presumptively immune to union challenges). ProMedica is aware of no authority recognizing the latter – *i.e.*, selling raffle tickets and the like

– as carrying this same presumption. As such, it makes little sense to suggest, as the Sixth Circuit and Board did in this case, that "the fact that the hospital had allowed some innocuous activity to go unpunished in the past would mean that *any* subsequent attempt by the hospital to control union solicitation in its patient care areas would have amounted to an unfair labor practice." *S. Md. Hosp. Ctr. v. NLRB*, 801 F.2d 666, 674 (4th Cir. 1986).

Moreover, and notwithstanding the acknowledged presumption that employers may bar solicitation in patient care areas, the position adopted by the Sixth Circuit and Board in this case would preclude most hospitals from ever applying such a ban as to union-related matters. *Cf. Allentown Mack Sales & Serv., Inc. v. NLRB*, 522 U.S. 359, 376 (1998) ("Because reasoned decisionmaking demands it, and because the systemic consequences of any other approach are unacceptable, the Board must be required to apply in fact the clearly understood legal standards that it enunciates in principle . . . ."). Hospitals are often sizable institutions that tend to employ large numbers of people. ProMedica, for example, employs approximately 7,300 persons in its Central Region. Further, hospitals tend to have relatively small management staffs. Federal government statistics suggest that only 1.3% of those employed in the health care field occupy medical or health service manager positions. *See* Bureau of Labor Statistics, U.S. Department of Labor, Career Guide to Industries, 2006-07 Edition, Health Care, *available at* http://www.bls.gov/oco/cg/cgs035.htm (visited December 21, 2006). This management-to-staff ratio is unlikely to change, as hospitals face ever increasing demands for their patient care services and ever increasing cost pressures. *See, e.g.*, Am. Hosp. Ass'n., *The State of America's Hospitals – Taking the Pulse* (April 2006), *available at* http://www.aha.org/aha/content/2006/PowerPoint/StateHospitalsChartPack2006.PPT (visited December 21, 2006). In

this environment, it is simply unrealistic to expect that a large hospital could hope to halt *every* instance in which an employee urged co-workers to purchase her daughter's Girl Scout cookies or raffle tickets benefiting programs at her church. Yet, this unattainable goal is precisely what, in the Sixth Circuit's and Board's view, is necessary to avoid a charge of discrimination if a hospital makes *any* attempt to halt union-related solicitation in patient care areas.

Patients, of course, would be the primary victims of a construct that renders solicitation policies largely unenforceable in the areas in which hospitals provide treatment. *See Beth Israel Hosp. v. NLRB*, 437 U.S. 483, 505 (1978) ("[I]n the context of health care facilities, the importance of the employer's interest in protecting patients from disturbance cannot be gainsaid."). But employees and the general public likewise stand to lose from a regime that encourages employers (albeit in a Sisyphean manner) to step up efforts to rid the workplace of even innocuous charitable solicitations. For these additional reasons, the writ should be granted or, at a minimum, the Sixth Circuit's decision should be summarily reversed.

CONCLUSION

For the foregoing reasons, the petition should be granted.

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